

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	Criminal No. K102888
	)	
LEE BOYD MALVO, a/k/a JOHN	)	
LEE MALVO	)	
	)	
Defendant.	)	
_____	)	

**MOTION TO INTERVENE AND TO RECONSIDER  
ACCESS TO CONDUCT STILL-PHOTOGRAPHY**

The Washington Post, The Associated Press, The Baltimore Sun Company, Cable News Network LP, LLLP ("CNN"), Media General Operations, Inc., t/a *Richmond Times-Dispatch*, The New York Times Company, The Radio-Television News Directors Association ("RTNDA"), The Reporters Committee for Freedom of the Press, and The Virginian Pilot, by undersigned counsel, respectfully move to intervene in this case for the limited purpose of seeking reconsideration of their motion for access to conduct still-photography coverage of public judicial proceedings in the above-captioned matter. Intervenor move for the opportunity to be heard on November 10, 2003 at 10:00 a.m. on the issue of whether good cause continues to exist to bar still-photography coverage of the trial in this case. Intervenor move this Court for an order permitting still-photography coverage of the trial pursuant to Virginia Code Section 19.2-266. The grounds for this Motion are as follows:

1. In March 2003, Intervenor (some jointly and some by separate motion) moved the Court for an Order permitting still-photography coverage of the

proceedings in this case. At that time, the Court determined that good cause was shown to bar still-photography from the proceedings. Accordingly, the Court denied Intervenors' motion. Intervenors respectfully submit that circumstances exist to warrant reconsideration of their motion.

2. Under Section 19.2-266, the court may exercise its discretion to bar cameras only upon a finding of "good cause shown." Va. Code § 19.2-266, "Coverage Allowed" at ¶ 1 ("For good cause shown, the presiding judge may prohibit coverage in any case and may restrict coverage as he deems appropriate to meet the ends of justice") (emphasis added); Novak, 20 Va. App. at 390-91, 457 S.E.2d at 410 ("Defendant failed to demonstrate 'good cause' to exclude the cameras"); Diehl, 9 Va. App. at 197, 385 S.E.2d at 232. The Virginia courts have consistently held that this standard is not met simply by generalized or conclusory assertions of prejudice. Vinson, 258 Va. at 471, 522 S.E.2d at 178 ("we reject defendant's conclusory argument that the trial court erred by permitting television cameras in the courtroom because his 'right to a fair and impartial jury' was 'prejudiced' by their presence"); Stewart, 245 Va. at 232-33, 427 S.E.2d at 402 (failure to provide showing of specific prejudice caused by the use of cameras at trial was insufficient); Novak, 20 Va. App. at 390-91, 457 S.E.2d at 410 (holding that defendant failed to demonstrate good cause for excluding cameras, as '[a]bsent a showing of prejudice of constitutional dimensions,' . . . the mere presence of cameras does not result in an unfair trial" (quoting Chandler v. Florida, 449 U.S. 560, 582 (1981)) (alteration in original)); Diehl, 9 Va. App. at 197 n.4, 385 S.E.2d at 232 n.4 (testimony of experienced trial attorney that "permitting cameras in court to document the

proceedings ‘may’ have an adverse effect upon the interest of the defendant” fails to demonstrate good cause); Fisher, 236 Va. at 410 n.2, 374 S.E.2d at 50 n.2 (rejecting defense’s “generalized objection” to cameras, noting that there was “no showing of prejudice or infringement of the defendant’s due-process rights”). Section 19.2-266 reflects Virginia’s commitment to open, fair, and impartial proceedings.

3. Here, many of the generalized assertions of disruption have been put to rest by the presence of still-cameras in Commonwealth v. Muhammad, Criminal Nos. 54362, 54363, 54364, and 54365, Circuit Court of Prince William County. Still-cameras have been present throughout the trial. To Intervenor’s knowledge, there has been no disruption of the proceedings. Nor to Intervenor’s knowledge has there been any claim or assertion of disruption by participants in the trial, including the Court, the Commonwealth, defense counsel, or witnesses. No reason exists to expect any different result from the presence of still-cameras in this trial, especially in light of the protective guidelines regulating coverage set forth in § 19.2-266. Indeed, because they have proven not to disrupt proceedings, cameras have been allowed in numerous criminal trials throughout the Commonwealth, including capital murder trials. See, e.g., Vinson v. Commonwealth, 258 Va. 459, 471, 522 S.E.2d 170, 178 (1999) (capital murder); Stewart v. Commonwealth, 245 Va. 222, 232-33, 427 S.E.2d 394, 402 (1993) (capital murder and first degree murder); Savino v. Commonwealth, 239 Va. 534, 547 n.4, 391 S.E.2d 276, 283 n.4 (1990) (capital murder); Fisher v. Commonwealth, 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 n.2 (1988) (capital murder); Novak v. Commonwealth, 20 Va. App. 373, 390-

91, 457 S.E.2d 402, 410 (1995) (capital murder); Diehl v. Commonwealth, 9 Va. App. 191, 197, 385 S.E.2d 228, 232 (1989) (first degree murder).

4. The timing of this motion for reconsideration bears on the potential for disruption. When Intervenors originally moved the Court, Defendant argued that the presence of still-cameras in pre-trial proceedings threatened his right to a fair trial, especially presence in pre-trial suppression hearings. Those proceedings are now concluded, and the trial is prepared to begin. To the extent that such a threat ever existed, it no longer does. Similarly, Defendant argued that still-photography would promote additional attention to the case producing coverage that might taint the jury pool. Since the venire has already been selected, that risk is also no longer present.

5. Defendant's counsel also argued that publishing Defendant's photograph was inappropriate because of his age and because it might prejudice potential jurors against him. As to the former issue, Defendant is recognized as an adult under Virginia law and in connection with the charges from which the case arises. As to the latter, the venire has already been selected; thus, that purported risk is no longer present. Moreover, Defendant's name and photograph have already appeared in the media, most recently in connection with Defendant's appearance as a witness in Commonwealth v. Muhammad, Criminal Nos. 54362, 54363, 54364, and 54365, Circuit Court of Prince William County. A feature-length film regarding the subject matter of these proceedings also aired nationally in recent weeks. Accordingly, Defendant's previous objections to still-photography of

the trial do not satisfy the requirements of good cause under Va. Code Section 19.2-266.

Respectfully submitted,

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